United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

75-7333

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

B P/S

Docket No. 75-7333

JANE MONELL, SUSAN TERRALL, BEVERLY ZAPATA and CAROL ABBEY, on their own behalf and on behalf of all others similarly situated,

Plaintiffs-Appellants,

v.

DEPARTMENT OF SOCIAL SERVICES OF THE CITY OF NEW YORK, JULE M. SUGARMAN, as Commissioner of the Department of Social Services, BOARD OF EDUCATION OF THE CITY OF NEW YORK, HARVEY B. SCRIBNER, as Chancellor of the City School District of the City of New York, and JOHN V. LINDSAY, as Mayor of the City of New York,

Defendants-Appellees.

Appeal From The United States District Court
For The Southern District of New York

REPLY BRIEF FOR APPELLANTS

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POINT I

MUNICIPAL OFFICERS ARE NOT IMMUNE FROM SUIT IN THEIR OFFICIAL CAPACITIES PURSUANT TO 42 U.S.C. §1983.

This court in the very recent case of Calo v. Paine, 521 F. 2d 411 (2nd Cir. 1975), has rejected the claim of immunity from §1983 suits asserted by defendants here. In Calo v. Paine, supra, plaintiff, a former employee of the City of Waterbury sued the Mayor and other officials of that City, alleging that he had been illegally dismissed in retaliation for political activities. Invoking 42 U.S.C. §1983, he sought, in addition to reinstatement, ..."back pay and compensatory and punitive damages ." Id, 521 F. 2d at 412. Defendants moved to dismiss on the ground that the action was in reality one against the City of Waterbury and was therefore barred by City of Kenosha v. Bruno, 412 U.S. 507 (1973).*/ This Court said:

> Judge Blumenfeld, in a thorough opinion, properly held that there was jurisdiction under 28 U.S.C. §1343(3), denying the contention that, although the action was against named officials of the City, it was nevertheless an action against the City itself which could not be brought under 42 U.S.C. §1983.
> - Calo v. Paine, supra, 521 F. 2d at 413. (Citation omitted).

Plaintiffs anticipate that defendants here will try to distinguish Calo v. Paine on two grounds. First, they will

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*/ City of Kenosha was not cited by the Court of Appeals in Calo v. Paine, supra, but was expressly considered by the District Court from which that appeal was taken, Calo v. Paine, 385 F. Supp. 1198, 1202 (D. Conn. 1974).

argue that the defendants in Calo were sued in their individual as well as official capacities. Though this is true, it is irrelevant because the primary relief sought i.e., reinstatement and back pay, could most properly be granted only against the defendants as officials. Moreover, neither this court nor the District Court rested on any such distinction. Had this Court meant to hold that the defendants in Calo were subject to §1983 claims only as individuals it would then have had to discuss the very different issues raised by such claims prior to reversing the dismissal below. Compare Scheuer v. Rhodes, 416 U.S. 232 (1974).

A second likely objection by defendants here will go to the distinction between monetary relief and reinstatement. They will no doubt urge that although this Court in Calo found the §1983 claim to be proper as to both, it really only meant to deal with the reinstatement claim.*/ Of course, had this Court intended any such distinction it would likely have said so. But there is a more fundamental answer to defendants' attempt to distinguish back pay from other kinds of relief, one which goes to the very heart of their entire position.

Boiled down, defendants' position rests on the proposition that City of Kenosha bars suits against municipal officials as well as against municipalities. But, defendants are forced - by a series of post-Kenosha decisions - to concede

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*/ See, on this point, Brief of Appellees at 10-11. This precise distinction is there urged as being of general importance.

that some types of injunctive relief continue to be appropriate against municipal officials (Brief of Appellee at 10). Yet, they say, City of Kenosha bars actions against municipal officials whenever monetary relief is sought. The fly in defendants' ointment is, of course, that City of Kenosha dealt not with monetary relief but with equitable relief of the very kind which courts have continued to award so long as an official rather than a city is the defendant. If City of Kenosha were to bar the monetary relief sought here therefore, it would necessarily also bar the other relief sought in Calo v. Paine, supra.

It does not bar either type of relief for the simple reason that there is a distinction, for §1983 purposes, between a suit against a city and one against its officials. The statute makes "persons" liable, not municipalities. As Mr. Justice Frankfurter has urged in a similar context, where statutory construction is at issue one should "go to the statute."*/

Defendant finds this reliance in the language of the statute "hypertechnical," Brief of Appellees at 18, but this Court has in at least one analogous case shown no difficulty in applying the language in §1983 literally. Thus, it was held in Aguayo v. Richardson, 473 F. 2d 1090, 1099-1100 (2nd Cir. 1973) that a welfare rights organization could not invoke §1983 as a plaintiff because it was not a "...citizen of the United States or other person," but this did not bar its members from suing.

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*/ Greenwood v. U.S., 350 U.S. 366, 374 (1966).

Even closer to the mark was the position of Commissioner Sugarman, a plaintiff in Aguayo v. Richardson, supra (and a defendant here). The question arose as to whether Commissioner Sugarman had standing to assert claims which could not have been asserted by the City of New York, Id 1100-1101. This Court there held that the Commissioner could assert such claims even though there was no issue as to his personal liability. Now, however, when the Commissioner is a defendant, the same approach becomes "hypertechnical!"

There are moreover, practical distinctions which might explain the Supreme Court's insistence that the letter of §1983 be obeyed. One of these involves the recognition that the heads of the various departments into which a modern municipality is subdivided (e.g. police, fire, welfare) are constantly in competition for a share of allocable resources. Requiring the §1983 complaint to name the individual official alleged to have discriminated will help the City to allocate the costs of the relief to his department, if it chose to do so. This kind of individualized assessment of responsibility also furthers the purposes of §1983 by providing an incentive for each official to comply which is less than personal liability but greater than a general assessment of municipal liability.

Defendants have also urged that public policy supports their view of §1983. Naturally they equate public policy with the protection of New York City's purse, Brief of Appellees at 11, 15. This self-serving approach overlooks the important

policy served by an award of back pay: it makes whole the victims of unlawful discrimination and it provides a powerful incentive against future wrongdoing, see Albermarle Paper Co. v. Moody, - U.S. -, 95 S. Ct. 2362 (1975); Harkless v. Sweeney Ind. School Dist., 427 F. 2d 319 (5th Cir. 1970).

Indeed we can observe that Congress recently reached the same conclusion on the policy issue as plaintiffs here urge when it subjected local governments to the coverage of Title VII of the Civil Rights Act of 1964 (42 U.S.C. §2000e as amended (1972)). Because of Title VII and because of the added possibility of damage suits bottomed on 28 U.S.C. §1331 a decision against plaintiffs here will not, in any event, insure the City of New York against liability for wrongful acts.

Nor is the City's present financial distress any more relevant here than is a defendant's solvency ever relevant to the issue of liability. This Court's decision on the scope of §1983 will likely have a far reaching development on the course of the law. Needless to say, such a decision ought not rest on the temporary financial problems of a single defendant.

Finally, even if this Court concludes that back pay is a remedy at law rather than equity and further finds that therefore back pay is not available against these defendants, */ reversal would nevertheless be appropriate because

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*/ Back pay is an equitable remedy, see Albemarle Paper Co. v. Moody, supra, and other authorities cited, Brief for Appellant at 12, f.n. Plaintiff's earlier incorrect characterization of back pay as damages, Amended Complaint at A-24 did not, of course, overrule these authorities.

the District Court erred in failing to grant injunctive relief to those women whose injuries went beyond loss of pay during their illegal suspension, i.e., those who lost salary step advancements which will, if not remedied, prejudice them for the rest of their academic careers. See, e.g., the affidavit of Ruth Fagen, Exhibit "O" to Plaintiff's Exceptions to the Recommendations of the Magistrate. She attested that her suspension as of February 1, 1973, cost her an advancement in pay level which would have been hers by virtue of seniority had she worked for one additional month as she had wished. Defendant urges that this issue cannot be considered because of a purported defect in pleading, Brief of Appellees at 5. This point overlooks plaintiff's generalized prayer for "other and further relief," Amended Complaint, A-25. It also overlooks the specific prayer that defendants be enjoined from enforcing the illegal policy, Amended Complaint, A-24 a prayer which is broad enough to encompass the continuing effects of the illegal policy, and, most important, it overlooks Rule 54 (C), FRCP.

POINT II

THIS ACTION SHOULD NOT BE DISMISSED FOR FAILURE TO JOIN ABSENT PARTIES.

After almost four years of litigation encompassing hearings before two district judges and a federal magistrate the defendants now urge, before this Court, that the Comptroller of the City of New York and the members of the Board of Education are indispensable parties. This unexplained delay is reason enough to reject defendants' new argument. A defense based on Rule 19(b) FRCP may not be raised for the first time on appeal, FRCP 12 (h) 2; Mastercrafters Clock & Radio Co. v. Vacheron & Constantin-LeCoultre Watchers, Inc., 221 F. 2d 464, 467 (2d Cir. 1955) cert. denied 350 U.S. 832 (1955). See also 5 Wright and Miller, Federal Practice and Procedure 862 (1969).

Furthermore, neither logic nor precedent supports defendants' argument. Defendants suggest that the members of the Board of Education are indispensable because they alone have the authority to direct the Comptroller to disburse funds for the Board, Brief of Appellee at 18. No authority is cited for this suggestion by the defendants, but see New York Education Law §2524 which authorizes defendant Scribner to submit vouchers to the Board of Education (or auditor) for approval for payment. The Board has no authority to reject vouchers for back pay because New York Education Law §2580

excludes salaries from the requirement of Board approval. Even assuming that the Board has the power to reject a request by defendant Scribner to issue back pay which has been mandated by a federal judge it so strains credulity to believe that the Board would do so that defendants' argument must be rejected. Since there has been no showing that a judgment for defendants here would be prejudicial to the Board members or to those who are defendants, Rule 19(b) FRCP counsels against dismissal because plaintiffs will have no adequate remedy if their action is now dismissed.

As to the Comptroller of the City of New York, 5 the Administrative Code of the City of New York §93(d)-1.0 expressly provides that he has no authority "...to dispute the amount of any salary established by or under the authority of any officer or department authorized to establish the same." Presently at issue in this litigation is back pay, which is thus within the authority of the defendants Mayor and Commissioner to order. Passing the specific issue of back pay there appears to be no case law supporting the proposition that the Comptroller is a necessary party to litigation against the City or its officials; to the contrary, see, e.g. Ellis v. City of New York, 295 N.Y. 780, 66 N.E. 2d 297 (1946) in which a judgment against the City was affirmed although the Comptroller was neither named nor served.

POINT III.

THE RECORD IN THIS CASE CONCLUSIVELY EVIDENCES THAT PLAINTIFFS HAVE COMPLIED WITH THE JURISDICTIONAL PREREQUISITES OF TITLE VII. THEREFORE, THIS COURT SHOULD HOLD THAT THE DISTRICT COURT HAS JURISDICTION UNDER TITLE VII AND SHOULD REJECT DEFENDANTS' REQUEST FOR A REMAND TO THE DISTRICT COURT FOR REPLEADING JURISDICTIONAL FACTS.

Without specification in their argument, defendants state that the amended complaint "is totally inadequate insofar as jurisdiction under Title VII is concerned."*/ This action has been pending an inordinately long time and all the facts and documents necessary for deciding whether plaintiffs have met the jurisdictional prerequisites for a Title VII action are not in dispute and are in the record before this Court. Therefore, it is urged that this Court decide this issue rather than remand to the district court for repleading.**/

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*/ Brief of Appellees at 23. The one specification of "inadequacy" made by defendants in their "Statement of the Case" at page 5 of their brief. They write that no allegation of jurisdictional facts are made in the amended complaint, paragraphs 1-3. Paragraph 2 of the amended complaint states that jurisdiction arises under Title VII of the Civil Rights Act of 1964. (Appendix, p. 14). See, Federal Rules of Civil Procedure, Appendix of Forms, Form 2. Defendants seem to assert that the allegation of timely filing of a charge of discrimination with the EEOC -- which allegation is made in the amended complaint at paragraph 43 -- is in the wrong place. This cannot be a serious argument.

**/ The issue of compliance with the jurisdictional prerequisites was argued and briefed before Magistrate Goettels and Judge Metzner but neither decided the issue.

See 28 U.S.C. §1653 which provides:

> Defective allegations of jurisdiction may be amended, upon terms in the trial or appellate courts.

In Willingham v. Morgan, 395 U.S. 402 (1969) the Supreme Court had before it, inter alia, the question of the sufficiency of the allegations in a petition for removal. The Court noted (395 U.S. at 407) that facts which should have appeared in the petition did not, and that they only appeared in affidavits. The Court, relying on 28 U.S.C. §1653, went on to decide the issue, without requiring the time-wasting procedure of a remand for repleading. The Court wrote:

> This material should have appeared in the petition for removal. However, for purposes of this review, it is proper to treat the removal petition as if it had been amended to include the relevant information in the later filed affidavits. See 28 U.S.C. §1653. (395 U.S. at 407, n. 3).

Like in Willingham, this Court should treat the amended complaint "as if it had been amended to include the relevant information in the later filed [documents]."

The jurisdictional prerequisites to a federal Title VII action are met "(i) by filing timely charges of employment discrimination with the [Equal Employment Opportunity] Commission, and (ii) by receiving and acting upon the Commission's statutory notice of the right to sue." McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). As will be shown below, plaintiffs have met both these prerequisites.*/

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*/ Because the filing of an EEOC charge by one plaintiff suffices for the entire class, Albermarle Paper Co. v. Moody, U.S. ; 95 S. Ct. 2362, 2370, n. 8 (1975), only the filing by one named plaintiff, Ms. Abbey, needs to be discussed.

footnote continued on next page.

A. The Timely Filing Of EEOC Charges

42 U.S.C. §2000e-5(e) provides that where proceedings are instituted initially with a state or local anti-discrimination agency, the time within which to charge must be filed with the EEOC is three hundred days after the unlawful employment practice has occurred or within thirty days after receipt of notice of termination of the state or local agency proceedings.

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footnote continued from preceeding page.

It was for this reason that only Ms. Abbey's EEOC charge was discussed in plaintiffs' brief. Defendants are in error therefore, when they label this reference only to Ms. Abbey's EEOC filing as a "retreat" from the allegations of the amended complaint that all named plaintiffs filed timely charges. (Brief of Appellees, p. 6).

Moreover, inasmuch as Ms. Abbey's EEOC charge and the right to sue letters of three named plaintiffs are in the possession of defendants' counsel, and were referred to in oral and written arguments before the Magistrate and district judge, defendants' plea of ignorance as to these matters (Ibid.) is unwarranted. Therefore, defendants' attempt to buttress their prayer for a remand for repleading by means of making the record seem unclear, is especially unwarranted. (Plaintiffs' counsel are aware of the difficulties of defendants' counsel caused by their repeated change of attorneys. Our clients, however, are unmoved by these difficulties.)

Ms. Abbey was placed on maternity leave on November 29, 1971.*/ On August 25, 1972, she filed a discrimination charge with the EEOC.**/ The EEOC deferred this charge to the State Division of Human Rights.***/ The Division of Human Rights terminated its proceedings on September 1, 1972,****/ whereupon the EEOC filed Ms. Abbey's charge and assumed jurisdiction.*****/

Thus, by September 1, 1972, which was within three hundred days after November 29, 1971, when she was placed on maternity leave, and within thirty days after the State agency terminated its proceedings, Ms. Abbey met the statutory time limit for filing her EEOC charge.******/

Another, although duplicative, ground for finding Ms. Abbey's EEOC filing to be timely is the settled law that if a discriminatory policy is a continuing one, the statutory period for filing an EEOC charge is tolled; the time period does not begin to run until the policy is discontinued. Weise v. Syracuse University, 522 F. 2d 397 (2nd Cir. 1975); Baitmess v. Drewrys U.S.A. Inc., 444 F. 2d 1186 (7th Cir. 1971), cert. denied 404 U.S. 939; Kohn v. Royall Koegall and Wells, 59 F.R.D. 515 (S.D.N.Y. 1973) and cases cited in Kohn.

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*/ Record, Document 9, Endorsement of J. Ryan, p. 1.

**/ Record, Document 39, Memorandum of Exceptions to Magistrates Report, Exhibit J.

***/ Id. Exhibit K.

****/ Id. Exhibit L.

*****/Id. Exhibit K.

******/ The procedure whereby a charge is filed with the EEOC, which then defers to the State agency and automatically assumes jurisdiction upon the termination of the State proceedings, has been held by the Supreme Court to constitute compliance with the filing requirements of 42 U.S.C. §2000e-(f)(1). Love v. Pullman, 404 U.S. 522 (1972).

In this case, the Board of Education continued its discriminatory maternity leave policy until November 28, 1973, at which time it changed the policy and made the policy retroactive to September 1, 1973. Under these circumstances, the time limit for filing extended three hundred days beyond November 28, 1973.

B. The Right To Sue Letters */

Admittedly, plaintiffs committed a procedural irregularity in that they did not obtain the right to sue letters before they amended their complaint to include the Title VII claims. However, it appears that all the cases which have decided the issue have concluded that the subsequent receipt of the right to sue letters, as by plaintiffs herein, cures this defect." Henderson v. Eastern Freight Ways, Inc. 460 F. 2d 258 (4th Cir. 1972) and cases cited therein. In Jones v. United Gas Importing Co., 8 FEP Cases 821 (E.D. Pa. 1974), the Court wrote:

> Because the issuance of a right to sue letter is a ministerial act required by both statute [fn. omitted] and applicable regulations [fn omitted] and not one involving the exercise of discretion by the Court, many federal courts have likewise held that the issuance of such a letter after the commencement of suit under Title VII cures the jurisdictional defect in the original complaint. **/ (8 FEP Cases at 824).

This should especially be the result in a case such as the instant one where the district court already had jurisdiction

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*/ There is some doubt as to whether in the case of state and municipal employees, the right to sue letter must come from the EEOC or the U.S. Department of Justice. In any event, plaintiffs obtained such letters from both such agencies (Record, Document 39, Exhibits D-I).

**/ On oral argument before the Magistrate, counsel for defendants conceded that any defect based on the right to sue letters had been cured.

over the subject matter and the parties pursuant to 42 U.S.C. §1983. See, Miller v. Continental Can Co., 5 FEP Cases 1195, 1199 (S.D. Ga. 1973). All that really happened in this case is that plaintiffs' attorneys waited until after they amended their complaint, and then wrote a form letter to the administrative agencies asking for those agencies to return a form letter to them.

> Moreover, it is a general policy of law to find a way in which to prevent loss of valuable rights, not because something was done too late but rather because it was done too soon. (Henderson v. Eastern Freight Ways, Inc., supra, 460 F. 2d at 260).

The record in this case, now before this Court, demonstrates compliance with the jurisdictional prerequisites of Title VII. Defendants' prayer for a remand for the purpose of repleading should be rejected.

POINT IV

DEFENDANTS' REQUEST THAT ON REMAND, THE CLASS ACTION ORDER OF THE DISTRICT COURT BE REVERSED IS NOT BEFORE THIS COURT FOR REVIEW. ASSUMING ARGUENDO, THAT THIS COURT MAY NOW REVIEW THE ISSUE OF CLASS ACTION STATUS, THE FACT THAT THIS IS A RULE 23(b)(2) CLASS REQUIRES REJECTION OF DEFENDANTS' PRAYER FOR DISMISSAL OF THE CLASS ACTION ASPECTS OF THIS CASE.

If there is to be a remand of this action for trial on the issue of back pay for the class,*/ as plaintiffs have urged, the order of the district court that the action may proceed as a class action should not be disturbed on this appeal.**/ The district court's class action order has not been appealed by

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*/ After four and one half years of denials, defendants have finally conceded what plaintiffs alleged in 1971 -- that defendants had a fixed and arbitrary "maternity leave" policy, (Brief of Appellees at 23, note *).

**/ District Judge Motley ordered the action maintainable as a class action. 357 F. Supp. 1051, 1054, Appendix, p. 13. Although Judge Motley did not specify the subdivision of the rule under which the action was maintainable, the necessary result of her findings is that the action is maintainable under subsection (b)(2) of Rule 23. Judge Motley noted that the complaint alleged that defendants acted pursuant to an unconstitutional policy generally applicable to the class. If this allegegation were proven, injunctive relief would be appropriate. Judge Motley also found that questions of law or fact common to members of the class predominate over any questions of law or fact affecting only individual members of the class, and that a class action is the superior method of adjudicating the controversy. These findings mean that the action is maintainable as a class action under Rule 23(b)(2) and (b)(3). Therefore, the class should be designated a "(b)(2)" class. Van Gemert v. Boeing Co., 259 F. Supp. 125 (S.D.N.Y. 1966); 3B Moore's Federal Practice, ¶23, 31[3]. Furthermore, civil rights actions are by their nature "(b)(2)" class actions. Oatis v. Crown Zellerbach Corp., 398 F. 2d 496 (5th Cir. 1968); Blue Bell Boots v. EEOC, 418 F. 2d 355 (6th Cir. 1969). See Advisory Committee Notes, 1966 Amendments to F.R.C.P. at 3B Moore's Federal Practice, ¶23.01 [10.-2].

defendants, as indeed it could not be, because it is not a final order under 28 U.S.C. §1291. Kohn v. Royall, Koegall and Wells, 496 F. 2d 1094 (2nd Cir. 1974).

Assuming arguendo, that the issue of the viability of the class action is properly before this Court for review, the fact that this is a (b)(2) class action compels the conclusion that even though the issue of back pay is the only remaining issue, the class action is still as viable as when the district court made its class action order. To dismiss the class action aspects of plaintiffs' case would be contrary to the nature of (b)(2) actions and would rip the guts from civil rights suits as an effective remedy for discrimination.

Back pay is an integral part of the equitable relief sought in an employment discrimination suit. In Johnson v. Georgia Highway Express, Inc., 417 F. 2d 1122 (5th Cir. 1969), the Court wrote:

> The demand for back pay is not in the nature of a claim for damages, but rather is an integral part of the statutory equitable remedy. (417 F.2d at 1125).

And back pay is an award made to the class. Albermare Paper Co. v. Moody, U.S. ; 95 S. Ct. 2362 (1975); Robinson v. Lorrillard Corp., 444 F. 2d 791 (4th Cir. 1971); Head v. Timken Roller Bearing Co., 486 F. 2d 870 (6th Cir. 1973); Johnson v. Goodyear Tire and Rubber Co., 491 F. 2d 211 (5th Cir. 1974); Bowe v. Colgate Palmolive Co., 416 F. 2d 711 (7th Cir. 1969).

Defendants'claim th[illegible]he back pay for each class member may be different (Brief of Appellees at p. 24) is unpersuasive as an argument against class relief. The process of making individual determinations is nothing more than the process of individual members "plugging in" pertinent information to enable them to recover as members of the class in whose favor liability has been found. Varying factors for individual members is present in every class action employment discrimination case; and certainly in this case there would be far less individual variations than in the typical class action employment discrimination case involving hiring and seniority issues in a large industrial plant.

Defendants' contentions that the change in their unlawful "maternity leave" policies obviating the need for injunctive relief requires a dismissal of the class action aspects for back pay purposes not only ignores the fact that the back pay is part of equitable (b)(2) relief, but would effectively destroy civil rights class actions and seriously undermine a major national goal of eradicating the scourge of employment discrimination. Under defendants' theory, a discrminator faced with a class action carrying substantial back pay liability could easily defeat the class action merely by changing its policy as soon as it recognizes the inevitability of an injunction against that policy. It cannot be doubted that a major reason for the effectiveness of the Civil Rights Acts (42 U.S.C. §§1981, 1983 and 2000e-et seq.) is the power of the courts, and the consistent use of that power, to make discriminatees whole by class action awards of back pay.

Two Circuits have held that the voluntary change by defendants of an unlawful employment policy, obviating the need for injunctive relief, does not disembowel the (b)(2) aspects of the class for back pay purposes. Wetzel v. Liberty Mutual Insurance Co., 508 F. 2d 239 (3rd Cir. 1975); Arkansas Education Ass'n v. Board of Education, 446 F. 2d 763 (8th Cir. 1971).

Defendants' sole reliance for their argument that the class action should be dismissed is Galvan v. Levine, 490 F. 2d 1255 (2nd Cir. 1973), cert. denied, 417 U.S. 936 (1974). (Brief of Appellees at p. 24). Galvan is in no way relevant to this case of employment discrimination. It does not stand for the proposition that a class action is not maintainable when the claim for an injunction prohibiting an unlawful policy is moot and only a claim for monetary relief remains.

In Galvan, the motion for a class action order was made only at the conclusion of the litigation in the district court. This Court affirmed the denial of that motion because there was no useful purpose to be served by such a motion. There was no useful purpose to be served for two reasons. The first was that the defendants withdrew their challenged policy, thus mooting the question of an injunction. (There is no question here as to the injunctive aspects of this case.) The second reason why no useful purpose would be served by a class action order in Galvan was that this Court ruled that the putative class members didn't have a right to monetary relief. There was no right because the putative class members were seeking past unpaid unemployment

benefits was to support unemployed persons for an interim period, and once that period had passed, there was no warrant for making present payments for past subsistence. But in the instant case, where unlike Galvan, the issue is employment discrmination, the right to relief in the form of back pay is a substantial and meritorious claim.

The difference between this case and Galvan is based on substantive rights. Defendants would misapply Galvan as a procedural device, out of context, in an attempt to defeat plaintiffs' significant substantive rights.

The defendants' attempts to evade liability for their wrongful conduct, by a misconstruction of Rule 23, should be rejected.

Respectfully submitted,

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